



1-1-1980

Environmental Protection

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Environmental Protection*, 12 PAC. L. J. (1981).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol12/iss2/20>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Environmental Protection

Environmental Protection; waste discharge fees and penalties

Health and Safety Code §25174 (amended); Water Code §§13260, 13261, 13265, 13268 (amended).

SB 1465 (Garamendi); STATS 1980, Ch 807

Support: Department of Finance; Water Resources Control Board

SB 1466 (Garamendi); STATS 1980, Ch 656

Support: Department of Finance; Department of Health Services; Water Resources Control Board

SB 1467 (Garamendi); STATS 1980, Ch 806

Support: Department of Finance; Department of Health Services

Chapters 807, 656, and 806 apparently were enacted to offset the mounting costs of comprehensive disposal site studies conducted by the Regional Water Quality Control Board and to prevent groundwater pollution and its potentially serious health hazards.¹ To accomplish these goals, these Chapters raise the maximum waste discharge filing fee,² establish civil penalties for violation of the waste discharge reporting provisions of the Water Code,³ and require the payment of a waste discharge fee by any person who disposes of hazardous waste.⁴

Prior law compelled a person discharging or proposing to discharge waste that could affect water quality in California, regardless of where the waste was disposed, to file a report with the appropriate Regional Water Quality Control Board unless this requirement was waived by the Board.⁵ Each report had to be accompanied by a filing fee, not to exceed \$1,000, determined according to a reasonable fee schedule established by the State Water Resources Control Board.⁶

Chapter 656 increases the maximum permissible filing fee to \$10,000 and provides that the fee must be calculated on the basis of total flow,

1. See Senator John Garamendi, Press Release, no. 32, Senate Passes Garamendi Toxic Waste Bill, April 24, 1980.

2. See CAL. WATER CODE §13260(d).

3. See *id.* §§13261(b), 13265(b), 13268(b).

4. See CAL. HEALTH & SAFETY CODE §25174. See also *id.* §25117 (definition of hazardous waste).

5. See CAL. STATS. 1969, c. 482, §18, at 1063 (enacting CAL. WATER CODE §13260); CAL. WATER CODE §13269 (existing waiver discharge requirements).

6. See CAL. STATS. 1969, c. 482, §18, at 1063.

volume, number of animals,⁷ or area involved.⁸ This is consistent with the method used to establish the existing fee.⁹ Additionally, Chapter 656 continues to require a report of any material change or proposed change in the character, location, or volume of the discharge.¹⁰

Failure to report a discharge or proposed discharge when a report was requested by the Board was a misdemeanor under prior law.¹¹ Chapter 807 retains this misdemeanor provision¹² and also establishes a civil penalty not to exceed \$25,000 for any person who either (1) discharges hazardous waste without filing a report,¹³ (2) knowingly furnishes a false report,¹⁴ (3) willfully fails to furnish a report,¹⁵ or (4) willfully withholds material information despite actual knowledge of the need to include the information.¹⁶

Existing law makes it a misdemeanor to discharge new waste or make a material change in any discharge after filing a report but prior to the issuance or waiver of waste discharge requirements or the expiration of 120 days after filing the report.¹⁷ Each day of discharge after the violation has been called to the attention of the discharger in writing by the Regional Board is deemed a separate offense.¹⁸ Chapter 807 additionally establishes a civil penalty not to exceed \$25,000 for each day of violation if the discharge is of hazardous waste, but does not require prior notification of the violation.¹⁹ The Chapter provides, however, that liability will not be imposed if the discharger is not negligent and immediately files a report of the discharge, or if the Regional Board determines that the violation is insubstantial.²⁰

It is also a misdemeanor to falsify or refuse to furnish a technical or monitoring report of an approved discharge if one is requested by the Regional Board.²¹ Chapter 807 adds a civil penalty not to exceed \$5,000 for each day that the reports are either falsified or not furnished if the discharge is of hazardous waste, or if the discharger knowingly

7. See 23 CAL. ADM. CODE §2200 (process waste from animals in confined holding or feeding areas).

8. See CAL. WATER CODE §13260(d).

9. Compare *id.* with 23 CAL. ADM. CODE §2200.

10. See CAL. WATER CODE §13260(b).

11. See CAL. STATS. 1970, c. 918, §3, at 1667 (amending CAL. WATER CODE §13261).

12. Compare CAL. WATER CODE §13261 with CAL. STATS. 1970, c. 918, §3, at 1667.

13. See CAL. WATER CODE §13261(b).

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.* §§13264, 13265(a).

18. See *id.* §13265(a).

19. See *id.* §13265(b). Compare *id.* with *id.* §13265(a).

20. See *id.* §13265(b).

21. See *id.* §13268. See also *id.* §13267(b) (authority to request technical or monitoring reports).

falsified or failed to furnish the report or any information contained therein.²²

Civil penalties under Chapter 807 are to be assessed by a superior court upon the petition of the Attorney General at the request of a Regional Board or the State Board.²³ Except in the case of a violation of a cease and desist order, a Regional Board or the State Board must conduct a hearing, with proper notice to all affected persons, prior to making a request to the Attorney General.²⁴ The civil liability provisions of Chapter 807, however, are expressly made inapplicable to the provisions enacted to implement the Federal Water Pollution Control Act dealing with navigable waters.²⁵

Chapter 806 also regulates waste disposal by imposing the payment of a fee on any person who disposes of hazardous waste.²⁶ Prior law required hazardous waste disposal site operators to pay the disposal fee only for lists of hazardous waste transported to them.²⁷ By eliminating the reference to transportation and changing the basis for payment, Chapter 806, in effect, imposes the fee on any person who disposes of hazardous waste on his or her own property, whether such hazardous waste has been transported to, or originates at, the site of disposal.²⁸

22. *See id.* §13268(b).

23. *See id.* §§13261, 13265, 13268, 13350(b).

24. *See id.* §13350(b).

25. *See id.* §§13261(b), 13265(b), 13268(b). *See generally* 33 U.S.C. §§1251-1376 (1976); 4 PAC. L.J. REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 501 (1973) (water pollution requirements and penalties).

26. *See* CAL. HEALTH & SAFETY CODE §25174.

27. *See* CAL. STATS. 1977, c. 1252, §313, at 4422 (amending CAL. HEALTH & SAFETY CODE §25174). *See generally* CAL. HEALTH & SAFETY CODE §§25160-25167.

28. *Compare* CAL. HEALTH & SAFETY CODE §25174 *with* CAL. STATS. 1977, c. 1252, §313, at 4422. *See also* Senator John Garamendi, Press Release, no. 32, Senate Passes Garamendi Toxic Waste Bills, April 24, 1980.

Environmental Protection; hazardous waste disposal penalties and enforcement

Health and Safety Code §25190 (repealed); §§25193, 25194, 25194.5, 25000.5 (new); §§25167, 25181, 25182, 25188, 25189, 25191, 25192 (amended).

AB 2408 (Tanner); STATS 1980, Ch 804

Support: Department of Finance; Department of Fish and Game; Department of Health Services

AB 3132 (Egeland); STATS 1980, Ch 876

(Effective September 10, 1980)

Support: Department of Finance; Department of Health Services

In an attempt to preclude the occurrence of future health hazards created by the wrongful disposal of hazardous waste¹ and to recover cleanup costs resulting from any unlawful waste disposal, the legislature enacted Chapter 876.² This Chapter effects changes in existing penalty provisions of the Hazardous Waste Control Law³ and provides for the granting of interim status, under specified conditions,⁴ to any person desiring to operate a hazardous waste facility pending the review of a permit application.⁵ A companion act, Chapter 804, authorizes city attorneys to bring actions and prosecute cases involving violations of the Hazardous Waste Control Law.⁶

Prior to the enactment of Chapter 876, any person⁷ who knowingly disposed of hazardous waste at an unauthorized site was subject to a fine not to exceed \$25,000 for each violation, or imprisonment not to exceed one year, or both.⁸ Chapter 876 imposes a fine not to exceed \$25,000 for each *day* that a person knowingly commits any of the following acts: (1) transports hazardous waste either to a facility that does not have a permit⁹ or to any unauthorized site;¹⁰ (2) treats, stores, or disposes of hazardous waste either at a facility that does not have a permit or at an unauthorized site;¹¹ (3) makes a false statement or representation in any document filed, maintained, or used for purposes of the Hazardous Waste Control Law;¹² or (4) withholds information regarding a real and substantial danger to public health or safety when information has been requested, in writing, by the Department of Health Services (hereinafter referred to as the Department) and the information is needed to carry out the responsibilities of the Department pursuant to the Hazardous Waste Control Law.¹³ Moreover, Chapter

1. See CAL. HEALTH & SAFETY CODE §25117 (definition of hazardous waste).

2. See CAL. STATS. 1980, c. 876, §10, at —.

3. See CAL. HEALTH & SAFETY CODE §§25188, 25189, 25191, 25193, 25194, 25194.5. See generally *id.* §§25000-25210 (Hazardous Waste Control Law).

4. See *id.* §25200.5(a), (b).

5. See *id.* §25200.5.

6. See *id.* §25181.

7. See *id.* §25118 (definition of person).

8. See CAL. STATS. 1977, c. 1039, §31.3, at 3150 (enacting CAL. HEALTH & SAFETY CODE §25191).

9. See generally CAL. HEALTH & SAFETY CODE §§25200-25204 (facility permit requirements).

10. See *id.* §25191(a).

11. See *id.* §25191(b).

12. See *id.* §25191(c).

13. See *id.* §25191(d) (party still may be alternatively or additionally imprisoned in the county jail for up to one year).

876 provides for a fine not to exceed \$50,000 for each day of violation, or imprisonment in the state prison for 16, 20, or 24 months, or in the county jail not to exceed one year, or both fine and imprisonment, if the conviction is for a violation after a first conviction under the Hazardous Waste Control Law.¹⁴ A facility operating under interim status,¹⁵ however, is not subject to civil or criminal penalties for operating without a permit.¹⁶

Chapter 876 makes additional changes in other penalty provisions of the hazardous Waste Control Law.¹⁷ Prior law contained a civil penalty, not to exceed \$5,000, to be imposed against persons disposing of *extremely hazardous waste*¹⁸ without a permit.¹⁹ Chapter 876 increases the civil penalty to not more than \$25,000 for each violation, and makes the penalty applicable to persons who negligently or intentionally dispose of *hazardous waste*.²⁰ Each day that the unauthorized deposit remains with the knowledge of the violator constitutes a separate violation unless the person files a report of the disposal with the Department and complies with an order issued by the director of the Department or by a court of competent jurisdiction for the cleanup of the hazardous waste.²¹

Furthermore, prior to the enactment of Chapter 876, no provision was made for the continued enforceability of claims against violators of the Hazardous Waste Control Law in the event that the violator withdrew his or her facility permit application or upon the suspension, expiration, or forfeiture of a facility permit.²² Chapter 876 expressly provides that, unless the Department consents thereto, the withdrawal of a permit application or the suspension, expiration, forfeiture, or transfer of a facility permit does not deprive the Department of its authority to continue or initiate a proceeding against a violator of the Hazardous Waste Control Law.²³

Chapter 804 also changes enforcement procedures under the Hazard-

14. See *id.* §25191.

15. See *id.* §25200.5. See generally *id.* §25200.5(d) (interim status may not be granted to any person who has been denied a hazardous waste facility permit, or who has had a facility permit suspended or revoked).

16. See *id.* §25200.5(c).

17. Compare *id.* §§25188, 25189, 25191, 25193, 25194, 25194.5 with CAL. STATS. 1977, c. 1039, §§31-32, at 3149-50.

18. See CAL. HEALTH & SAFETY CODE §25115 (definition of extremely hazardous waste).

19. See CAL. STATS. 1977, c. 1039, §31.1, at 3150 (enacting CAL. HEALTH & SAFETY CODE §25189).

20. See CAL. HEALTH & SAFETY CODE §25189(c).

21. See *id.*

22. Compare *id.* §25194.5 with CAL. STATS. 1977, c. 1039, §§29-32, at 3149-50 and CAL. STATS. 1972, c. 1236, §1, at 2388-93 (operative July 1, 1973).

23. See CAL. HEALTH & SAFETY CODE §25194.5.

ous Waste Control Law.²⁴ Prior to Chapter 804, only district attorneys and the Attorney General were authorized to prosecute cases involving violations of the Hazardous Waste Control Law.²⁵ With the enactment of Chapter 804, a city attorney of any city where violations have occurred or will occur also may prosecute cases involving hazardous waste violations.²⁶ In addition, if civil penalties are awarded in an action brought by a city attorney or district attorney, the city or county is to be reimbursed for the actual costs incurred by the city attorney or district attorney in prosecuting the case, or one-half the penalty awarded, whichever is less.²⁷

24. Compare *id.* §§25181, 25192 with CAL. STATS. 1977, c. 1039, §32, at 3150 and CAL. STATS. 1972, c. 1236, §1, at 2392-93.

25. See CAL. STATS. 1972, c. 1236, §1, at 2392-93.

26. See CAL. HEALTH & SAFETY CODE §25181.

27. See *id.* §25192.

Environmental Protection; hazardous waste sites—land use restrictions

Health and Safety Code §§25120, 25124 (repealed); §§25117.3, 25117.4, 25121.5, 25122.5, 25123.5, 25156, 25177, 25185.5, 25195, 25196, 25202.5, 25202.6, 25202.7, 25220-25240 (new); §§25116, 25119, 25121, 25122, 25185, 25200, 25201, 25202 (amended); Revenue and Taxation Code §402.3 (new).

SB 1499 (Presley); STATS 1980, Ch 655

Support: Department of Finance; Department of Health Services

AB 2362 (Gage); STATS 1980, Ch 259

Support: Department of Finance; Department of Health Services

AB 2370 (Filante); STATS 1980, Ch 1161

Support: Department of Health Services

AB 2691 (Tucker); STATS 1980, Ch 878

Support: Department of Finance; Department of Health Services

Places land use restrictions on hazardous waste property and border zone property; provides for the recordation of a restrictive covenant limiting the present and future land use of a hazardous waste facility as a condition for obtaining a hazardous waste facility permit; and prohibits

a hazardous waste facility from refusing to accept hazardous waste based on the geographic origin of the waste.

The Hazardous Waste Control Law¹ was enacted in 1972 to prevent future threats to public health and safety caused by the increased generation and disposal of hazardous waste² without adequate governmental safeguards.³ The Department of Health Services (hereinafter referred to as the Department) was given the duties of adopting standards for the handling,⁴ processing,⁵ use,⁶ storage,⁷ and disposal⁸ of hazardous waste⁹ and enforcing the provisions of the Hazardous Waste Control Law.¹⁰ The enactment of Chapters 259, 655, 878, and 1161 supplements the existing powers of the Department by allowing the imposition of land use restrictions on hazardous waste property¹¹ or border zone property¹² and by placing new conditions on the issuance of a hazardous waste facility permit.¹³

Restrictive Covenants

Under existing law, it is unlawful to dispose of hazardous waste without first obtaining a hazardous waste facility permit pursuant to the Hazardous Waste Control Law.¹⁴ The requirements for obtaining a permit may include building regulations, limitations on the types of hazardous waste that may be disposed, and special operating conditions deemed necessary by the Department of Health Services.¹⁵ Chapters 259 and 655 supplement the existing requirements for obtaining a hazardous waste facility permit by enabling the Department to place restrictive covenants on hazardous waste facility land¹⁶ and by prohibiting hazardous waste facilities from refusing to accept hazardous waste

1. *See generally* CAL. HEALTH & SAFETY CODE §§25100-25240; 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 559 (1978); 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 508 (1973).

2. *See* CAL. HEALTH & SAFETY CODE §25117 (definition of hazardous waste).

3. *See id.* §§25100, 52101.

4. *See id.* §25116 (definition of handling).

5. *See id.* §25119 (definition of processing).

6. *See id.* §25124 (definition of use).

7. *See id.* §25123 (definition of storage).

8. *See id.* §25113 (definition of disposal).

9. *See id.* §25150.

10. *See id.* §25180.

11. *See id.* §25117.3 (definition of hazardous waste property).

12. *See id.* §25117.4 (definition of border zone property).

13. *See id.* §§25200, 25202.5, 25232. *See generally id.* §§25200-25204 (hazardous waste facility permit requirements).

14. *See id.* §25201.

15. *See id.* §§25200, 25202.

16. *See id.* §25202.5.

based on the geographic origin of the waste.¹⁷

Specifically, Chapter 655 allows the Department to require, as a condition for obtaining a hazardous waste facility permit, the imposition of a restrictive covenant¹⁸ that limits present and future use of all or part of the land on which a hazardous waste facility is located *and* on all or part of any adjacent land held by, or for the beneficial use of, the owners of the land on which a hazardous waste facility is located.¹⁹ The restrictions included in the written instrument imposing the covenant may affect activities occurring on, over, or under the land, but must not be more restrictive than needed to protect public health and safety.²⁰ In addition, the covenant will run with the land²¹ to bind all owners, heirs, successors, and assignees of the land as well as their agents.²² The written instrument imposing the restrictive covenant must be recorded by the owner of the hazardous waste facility land within ten days of the execution of the restrictions, and a certified copy of the recorded instrument must be sent to the Department.²³ Chapter 655 also provides for the removal or modification of any covenant upon the request of the owner of the affected land and upon the review and concurrence of the Department.²⁴ Any decision by the Department may be reviewed by a court of competent jurisdiction, although the decision of the Department must be upheld if the court finds that it is supported by substantial evidence.²⁵

Chapter 259 adds a further condition to the issuance of a hazardous waste facility permit.²⁶ Existing law allows the Department to issue hazardous waste facility permits to those facilities that meet specified building standards and other standards and requirements adopted by the Department.²⁷ Chapter 259 adds the requirement that an operator of a hazardous waste facility receiving hazardous waste from more than one producer may not refuse to accept hazardous waste based on the geographic origin of the waste if the facility is authorized to accept that type of waste and if the waste may be accepted without resulting in an

17. *See id.* §25200.

18. *See generally* 54 CAL. JUR. 3d. *Real Estate Sales* §269 (Rev. 1979), 26 CAL. JUR. 3d. *Deeds* §§229-236 (Rev. 1976).

19. *See* CAL. HEALTH & SAFETY CODE §25202.5.

20. *See id.* (covenant may not limit use, modification, or expansion of an existing industrial or manufacturing facility or complex).

21. *See generally* CAL. CIV. CODE §1460 (covenants running with the land).

22. *See* CAL. HEALTH & SAFETY CODE §25202.5.

23. *See id.*

24. *See id.* §25202.6.

25. *See id.* §25202.7. *See generally* CAL. CIV. PROC. CODE §1094.5.

26. *Compare* CAL. HEALTH & SAFETY CODE §25200 *with* CAL. STATS. 1979, c. 1152, §193, at

27. *See* CAL. HEALTH & SAFETY CODE §25200.

extraordinary hazard.²⁸

Hazardous Waste or Border Zone Property

Chapter 1161 provides that whenever the Department has reasonable cause to believe that any land is hazardous waste property, the Department may request specified information,²⁹ conduct hearings,³⁰ and make determinations whether the land should be designated as hazardous waste property or border zone property.³¹ Any person³² who has been requested to provide information must submit the information within 90 days of receipt of the request.³³ The Chapter also mandates that any person, as owner, lessor, or lessee who (1) knows or has probable cause to believe that there has been a significant disposal of hazardous waste on, under, or into the land, or that the land is within 2,000 feet of a significant disposal of hazardous waste, *and* (2) intends to construct a building to be used for specified purposes, *must* apply to the Department for a determination whether the land should be designated as hazardous waste property or border zone property.³⁴ Knowing violation of this provision subjects the person to a civil penalty not to exceed 25 percent of the fair market value of the land and improvements, 25 percent of the sale price of the land and improvements, or \$50,000, whichever has been established and is greatest.³⁵ Any person as owner, lessor, or lessee, or a city or county that knows or has probable cause to believe that certain land may be hazardous waste property or border zone property, may apply for a Department determination of the status of the land.³⁶

Chapter 1161 also provides that hearings conducted by the director of the Department, or his or her designated agent,³⁷ to determine the status of land must follow certain procedural standards regarding notice,³⁸ consolidation of hearings,³⁹ discovery,⁴⁰ burden of proof,⁴¹ the right of affected persons to be heard,⁴² and review.⁴³ Specifically, the

28. *See id.*

29. *See id.* §25220(a).

30. *See id.* §§25222(a), 25223-25228.

31. *See id.* §25229.

32. *See id.* §25118 (definition of person).

33. *See id.* §25220(b).

34. *See id.* §25221(a). *See generally id.* §§25229, 25232.

35. *Id.* §25196.

36. *See id.* §25221(b), (c).

37. *See generally* §§25222-25224.

38. *See id.* §§25222(a), 25223.

39. *See id.* §25225.

40. *See id.* §25227. *See generally* CAL. GOV'T CODE §§11507.6, 11507.7, 11510, 11511.

41. *See* CAL. HEALTH & SAFETY CODE §25228.

42. *See id.* §25226.

43. *See id.* §25231.

Chapter provides that notice of the hearing must be served on the owner of the land and on the legislative body of the city or county in whose jurisdiction the land is located.⁴⁴ The notice must include information concerning the time, date, and place of the hearing, and reasons why the land should be designated as hazardous waste property or border zone property.⁴⁵ Public notice of the hearing also must be provided by publication or posting at least 15 days prior to the hearing.⁴⁶ Persons served with notice of the hearing have the right to file responses to the notice and to appear in person and give testimony at the hearing.⁴⁷ Any other interested person may be allowed to intervene in the proceeding and give testimony at the discretion of the person conducting the hearing.⁴⁸ Chapter 1161 also declares that, in determining the status of the land, the Department has the burden of proving that hazardous waste has been deposited on, under, or into the land, or within 2,000 feet of the land, *and* that the hazardous waste creates a significant existing or potential hazard to present or future public health and safety.⁴⁹ Any decision by the Department concerning hazardous waste or border zone property designations may be reviewed by a court of competent jurisdiction under specified procedures in the Code of Civil Procedure.⁵⁰ Chapter 1161 also provides for the removal of hazardous waste or border zone property designations if evidence exists that either the hazardous waste that caused the designation has been removed or altered in a manner that precludes any present or future health hazard,⁵¹ or if there is new scientific evidence concerning either the waste or the geology of the hazardous waste or border zone property.⁵²

Land Use Restrictions and Easements

Once the Department has designated land as hazardous waste property or border zone property, Chapter 1161 provides for the imposition of land use restrictions and easements⁵³ on the land.⁵⁴ Specifically, Chapter 1161 declares that, without an approved variance issued by the Department,⁵⁵ hazardous waste property may not be subdivided⁵⁶ un-

44. *See id.* §25222(a).

45. *See id.*

46. *See id.* §25223.

47. *See id.* §25226.

48. *See id.*

49. *See id.* §25228.

50. *See id.* §25231. *See generally* CAL. CIV. PROC. CODE §1094.5.

51. *See* CAL. HEALTH & SAFETY CODE §25234(a)(1).

52. *See id.* §25234(a)(2).

53. *See generally* CAL. CIV. CODE §§801-811 (easements).

54. *See* CAL. HEALTH & SAFETY CODE §§25230, 25232.

55. *See* text accompanying footnotes 80-89 *infra*.

56. *See generally* CAL. GOV'T CODE §§66410-66499.37 (subdivision regulations).

less the division is to separate hazardous waste property from other portions of the property not designated as hazardous waste property;⁵⁷ nor can any new use of the land occur.⁵⁸ Additionally, once a parcel has been designated as border zone property, unless a specific variance has been granted by the Department, no building to be used as a residence, hospital for humans, school for persons under 21, day care center for children, or any other permanently occupied structure may be constructed or placed on the land.⁵⁹ Furthermore, the land may not be subdivided unless to separate portions designated as border zone property from the other portions of the parcel.⁶⁰ Chapter 1161 provides, however, that a tax assessor may consider any of these land use restrictions, easements, or covenants as enforceable land use restrictions⁶¹ and reassess the land at the lien date following the imposition of the restriction or covenant.⁶² The land use restrictions on hazardous waste property are not applicable to a *portion* of a parcel of land that meets *all* of the following requirements: (1) the parcel has previously been classified as a Class II-1 disposal site;⁶³ (2) the portion of the parcel is physically isolated from the rest of the parcel by the construction of a freeway;⁶⁴ (3) the portion of the parcel has not been used as a hazardous waste disposal site;⁶⁵ and (4) the portion of the parcel does not contain or overlie hazardous waste.⁶⁶

Chapter 1161 also mandates that no hazardous waste or extremely hazardous waste⁶⁷ may be disposed of onto or into any land that is within 2,000 feet of an existing residence, hospital for humans, school for persons under 21, day care center for children, or any other permanently occupied structure.⁶⁸ In addition, any hazardous waste disposal site that opens or reopens after August 6, 1980, must have a minimum buffer zone of at least 2,000 feet between the actual disposal point and any of the specified types of structures.⁶⁹ The 2,000-foot buffer zone provision does not apply to a hazardous waste facility that was lawfully

57. See CAL. HEALTH & SAFETY CODE §25232(a)(2).

58. See *id.* §25232(a)(1) (except the use, modification, or expansion of an existing industrial or manufacturing facility on land that is hazardous waste property).

59. See *id.* §25232(b)(1).

60. See *id.* §25232(b)(2).

61. See *id.* §25240. See generally CAL. REV. & TAX. CODE §402.1.

62. See CAL. HEALTH & SAFETY CODE §25240; CAL. REV. & TAX. CODE §402.3.

63. CAL. HEALTH & SAFETY CODE §25232(c)(1). See generally 23 CAL. ADM. CODE §§2510, 2511.

64. CAL. HEALTH & SAFETY CODE §25232(c)(2). See generally CAL. VEH. CODE §332 (definition of freeway).

65. CAL. HEALTH & SAFETY CODE §25232(c)(3).

66. *Id.* §25232(c)(4).

67. See *id.* §25115 (definition of extremely hazardous waste).

68. See *id.* §25238(a).

69. See *id.* §25238(c).

disposing of hazardous waste as of August 6, 1980, unless the disposal violates a restrictive covenant placed upon the land.⁷⁰

Chapter 1161 also provides that once land has been designated as hazardous waste or border zone property, the director of the Department may require the execution of an easement upon the land that permits the Department or its representatives to enter the land and monitor problems regarding hazardous waste.⁷¹ The monitoring process may include the taking of soil, air, or water samples,⁷² photography,⁷³ and the maintenance and use of monitoring equipment.⁷⁴ In addition, Chapter 878 provides that any willful interference with the monitoring process will be punished as a misdemeanor.⁷⁵ Under Chapter 1161, the easement created runs with the land to bind all owners and their heirs, successors, and assignees, as well as their agents.⁷⁶ The written instrument imposing the easement must be recorded with the recorder of the county in which the land is located within ten days of the execution of the easement.⁷⁷ Chapter 1161 also requires that any lease or rental agreement concerning the land after it has been designated as hazardous waste property or border zone property must contain a specified statement detailing the status of the land as containing hazardous waste.⁷⁸ Furthermore, Chapter 1161 provides for the automatic termination of any easement upon the removal of the designation of hazardous waste property or border zone property.⁷⁹

Variance Provisions

Chapter 1161 provides that an aggrieved person may apply to the Department for a written variance from the land use restrictions placed upon hazardous waste property or border zone property.⁸⁰ The Chapter requires that the Department give sufficient notice to affected persons and conduct a hearing to determine whether to grant a variance.⁸¹ At the hearing, the applicant has the burden of proof to show that a variance will not cause any of the following effects: (1) the creation or

70. *See id.* §25238(b).

71. *See id.* §25230(a). *See generally id.* §§25185, 25185.5.

72. *See id.* §25185.5(a).

73. *See id.* §§25185(a)(5), 25185.5(d).

74. *See id.* §25185.5(b).

75. *See id.* §25195.

76. *See id.* §25230(a).

77. *See id.*

78. *See id.* §25230(b).

79. *See id.* §25234(f).

80. *See generally id.* §25233 (variance provisions).

81. *See id.* §25233(a).

increase of significant present or future hazards to public health;⁸² (2) any significant diminution of the ability to mitigate potential or actual hazards to the public health;⁸³ and (3) any long-term increase in the number of humans or animals exposed to significant hazards that affect the health, well-being, or safety of the public.⁸⁴ The director's decision must be based on a preponderance of the testimony taken at the hearing and must be served on the owner of the land, the legislative body of the city or county in whose jurisdiction the land is located, and on any other person who was permitted to intervene in the proceedings.⁸⁵ This decision must include findings of fact in support of the granting or denial of the variance.⁸⁶ Chapter 1161 expressly mandates that an applicant may not make another variance application for at least 18 months after the final decision of the director.⁸⁷ Variance decisions made by the director, however, may be reviewed by a court of competent jurisdiction, but the decision must be upheld if the court finds that the decision is supported by substantial evidence.⁸⁸

Conclusion

With the enactment of Chapters 259, 655, 878, and 1161, the Department now has increased power to regulate hazardous waste disposal for the purpose of preventing threats to public health and safety.⁸⁹ The Chapters add conditions that must be met prior to obtaining a hazardous waste facility permit,⁹⁰ place land use restrictions on land designated as hazardous waste or border zone property,⁹¹ and impose easements for the monitoring of problems associated with hazardous waste on land designated as hazardous waste property or border zone property.⁹²

82. *Id.* §25233(b)(1).

83. *Id.* §25233(b)(2).

84. *Id.* §25233(b)(3).

85. *See id.* §25233(c).

86. *See id.* §25233(c), (d).

87. *See id.* §25233(a).

88. *See id.* §25233(f). *See generally* CAL. CIV. PROC. CODE §1094.5.

89. *See generally* CAL. HEALTH & SAFETY CODE §§25100, 25101.

90. *See id.* §§25202.5, 25202.6, 25202.7. *Compare id.* §§25200, 25202 with CAL. STATS. 1979, c. 1152, §193, at — and CAL. STATS. 1978, c. 1397, §15, at 4623.

91. *See generally* CAL. HEALTH & SAFETY CODE §25232.

92. *See generally id.* §25230.

Environmental Protection; water quality

Health and Safety Code §25204 (new); Water Code §13271 (new); §§13050, 13350 (amended).

AB 2823 (Berman); STATS 1980, Ch 877

Support: Department of Finance; State Water Resources Control Board

Existing law provides that any person who intentionally or negligently causes waste¹ to be deposited in state waters,² thereby creating a condition of pollution³ or nuisance⁴ in violation of state or regional waste discharge regulations or an order of a state or regional board,⁵ may be civilly liable for up to \$6,000 for each day during which the violation occurs.⁶ This liability also applies to the intentional or negligent violation of a cease and desist order of a state or regional board⁷ and to the intentional or negligent discharge of oil or any petroleum products into state waters.⁸

Chapter 877 establishes civil liability for the unlawful discharge of hazardous substances.⁹ Any person who unlawfully causes or permits a hazardous substance to be discharged in or on state waters, where it creates a condition of pollution or nuisance, is strictly liable for a fine of up to \$6,000 per day of discharge, regardless of intent or negligence.¹⁰ An exception is provided, however, if the discharge is caused by war,¹¹ negligence of a state or federal governmental entity,¹² or any circumstance or event that occurs despite the exercise of every reasonable precaution to prevent or mitigate the discharge.¹³ Also, existing law permits the imposition of liability for the unlawful discharge of

1. See CAL. WATER CODE §13050(d) (definition of waste).

2. See *id.* §13050(e) (definition of waters of the state).

3. See *id.* §13050(1) (definition of pollution). See generally 26 OP. ATT'Y GEN. 253 (1955).

4. See CAL. WATER CODE §13050(m) (definition of nuisance).

5. See *id.* §§13050(a) (definition of state board), (b) (definition of regional board), 13350(a)(2).

6. See *id.* §13350(a).

7. See *id.* §13350(a)(1).

8. See *id.* §13350(a)(3); *People ex rel. Younger v. Superior Court*, 16 Cal. 3d 30, 39-42, 544 P.2d 1322, 1328-30, 127 Cal. Rptr. 122, 128-30 (1976). See generally Comment, *The Port of Oakland Decision: California Oil Spill Legislation Gets Watered Down*, 7 GOLDEN GATE U.L. REV. 499 (1977).

9. See CAL. WATER CODE §§13050(p), 13271(g) (definition of hazardous substances), 13350(b). See also 33 U.S.C. §1321(b)(2)(A) (1976); CAL. HEALTH & SAFETY CODE §25140.

10. See CAL. WATER CODE §13350(b).

11. See *id.* §13350(c)(1).

12. See *id.* §13350(c)(3).

13. See, e.g., *id.* §13350(c)(2) (unanticipated grave natural disaster), (c)(4) (intentional act of a third party), (c)(5) (any other circumstance or event causing the discharge).

waste in addition to other applicable civil and criminal penalties;¹⁴ under Chapter 877, however, a violation of the provision prohibiting the discharge of pollutants, or dredged or fill material,¹⁵ gives rise to liability *only* under that provision and not under the provision prohibiting the unlawful discharge of hazardous substances.¹⁶

Additionally, Chapter 877 requires that any person permitting or causing an unlawful discharge or probable discharge of a hazardous substance into state waters must provide notice of the discharge to the Office of Emergency Services¹⁷ or other appropriate federal agency¹⁸ or regional board.¹⁹ The notice must be provided as soon as the person has knowledge of the discharge and notification is possible and can be provided without substantially impeding cleanup or other emergency measures.²⁰ This notification, and any information resulting therefrom, may not be used in any criminal case against the person providing the notice except in a prosecution for perjury or for giving a false statement.²¹ Failure to provide notice in compliance with this provision is a misdemeanor punishable by a fine of up to \$20,000, imprisonment for up to one year, or both.²² This penalty, however, does not apply to a discharge on land that does not result in a discharge to state waters unless the discharge to state waters would have occurred but for cleanup or emergency response by a public agency.²³

Finally, a state agency may not refuse to issue a hazardous waste facility permit or license on the grounds that the applicant has not yet been granted a local land use permit.²⁴ The agency may provide, however, that the permit or license is not effective until the land use permit is granted.²⁵

14. Compare *id.* §13350(g) with CAL. STATS. 1971, c. 668, §1, at 1322 (amending CAL. WATER CODE §13350(d)).

15. See CAL. WATER CODE §13385.

16. See *id.* §13350(b) (prohibition of unlawful discharge of hazardous substances), (g).

17. See *id.* §13271(a).

18. See *id.* §13271(e).

19. See *id.* §13271(f). See generally *id.* §§13267, 13383.

20. See *id.* §13271(a).

21. See *id.* §13271(d).

22. See *id.* §13271(c).

23. See *id.*

24. See CAL. HEALTH & SAFETY CODE §25204.

25. See *id.*

